

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KAREN OSBORN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>O'CONNOR COMPANY, INC.</b>	)	Docket No. 1,032,359
Respondent	)	
AND	)	
	)	
<b>CHUBB INDEMNITY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the March 19, 2008 Preliminary Decision of Administrative Law Judge Robert H. Foerschler (ALJ). Claimant was awarded additional temporary total disability compensation (TTD) from the date of her application for hearing and authorized treatment with Steven B. Wilkinson, M.D., of Midwest Brain, Spine and Neurology Associates.

Claimant appeared by her attorney, Mark E. Kolich of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeff S. Bloskey of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held April 12, 2007, with attachments; the transcript of the Preliminary Hearing held November 29, 2007, with attachments; the transcript of the Preliminary Hearing held March 17, 2008, with attachments; and the documents filed of record in this matter.

**ISSUE**

Respondent has raised the following issue on appeal to the Board from the Preliminary Decision of the ALJ:

“Whether Claimant’s need for additional medical treatment is the result of an injury arising out of and in the course of Claimant’s employment with Respondent.”<sup>1</sup>

**FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be affirmed.

Claimant suffered accidental injury which arose out of and in the course of her employment with respondent on October 24, 2006. Medical treatment was provided by an occupational clinic where claimant was provided physical therapy. The compensability of this claim has not been disputed. At the first preliminary hearing on April 12, 2007, respondent admitted, for preliminary hearing purposes, that this injury is compensable. As the result of that hearing, claimant was awarded TTD from the ALJ’s Preliminary Decision of April 25, 2007.

There has been an ongoing dispute in this matter regarding the extent of medical care needed by claimant and which health care provider should provide same. Claimant, at various times, has come under the care of Terrence Pratt, M.D., of Rockhill Orthopaedics, P.C.; Edward J. Prostic, M.D., of Mid-America Orthopaedic Clinic; Steven B. Wilkinson, M.D.; Wesley E. Griffitt, M.D.; Dwayne E. Jones, M.D., a pain management specialist; Scott H. Goodman, M.D.; David K. Ebelke, M.D.; and Mark Bernhardt, M.D.

Claimant has undergone MRIs of her low back and right hip, x-rays, a bone scan, a lumbar myelogram and CT scan of her lumbar spine, a discogram at L3-4, L4-5 and L5-S1, multiple physical therapy sessions, right lower extremity EMGs and pain management.

The matter proceeded to preliminary hearing on November 29, 2007, at which time claimant was requesting a lumbar fusion at L4-5 under the care of Dr. Wilkinson. Respondent again did not contest the compensability of this matter, but did contest the need for surgery. The matter was taken under advisement by the ALJ while claimant was referred to Dr. Bernhardt, by agreement of the parties, for an evaluation as to the need for the recommended surgery. Dr. Bernhardt was to determine claimant’s need for surgery,

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<sup>1</sup> Application For Review at 1.

and if not recommended, the extent of her permanent impairment from her work-related injuries with respondent.

Dr. Bernhardt, in his report of December 18, 2007, noted that, while Dr. Wilkinson recommended a lumbar discography followed by a possible L4-5 fusion or disc replacement, Dr. Griffitt did not feel claimant was a good candidate for any surgery. Dr. Bernhardt, while acknowledging that Dr. Wilkinson made some good points, agreed with Dr. Griffitt that claimant was not a good candidate for surgery. He also recommended that claimant be referred to a pain management program.

Claimant underwent the diagnostic post CT lumbar discogram on January 8, 2008, under the hands of Johnson Underwood, IV, M.D., which revealed findings consistent with a disk herniation at L4-5 and L5-S1. Dr. Jones, in his report to Dr. Wilkinson of January 15, 2008, noted the results and provided his recommendation that claimant not undergo the surgery.

Claimant then underwent a lumbar myelogram on February 8, 2008, under the care of Dr. Ebelke, which verified degenerative disc disease at L4-5, but, in Dr. Ebelke's opinion, displayed no evidence of a disc herniation at any level. Dr. Ebelke did note that the radiologist had read the findings as consistent with disc herniation at L4-5 and L5-S1. Dr. Ebelke agreed with the recommendation that claimant avoid surgery. Dr. Ebelke did, although reluctantly, note that claimant "might" benefit from a dorsal column stimulator, but was unwilling to state the need for the stimulator was related to claimant's work-related injury.

In his report of January 21, 2008, Dr. Wilkinson recommended a spinal cord stimulator trial be conducted to determine if claimant would receive some relief from her pain. If the use of a spinal cord stimulator provided benefit to claimant, then claimant has requested the permanent installation of the stimulator under the care of Dr. Wilkinson. The Preliminary Decision of March 19, 2008, discusses the request for the implementation of the stimulator and then authorizes Dr. Wilkinson as the treating physician. While the decision does not expressly authorize the insertion of the stimulator, the inference is certainly there for the authorization of the device.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

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<sup>2</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>4</sup>

Respondent has not disputed the fact of an accident arising out of and in the course of claimant's employment with respondent. There has been an ongoing and almost continuous battle over the extent of claimant's injuries and what medical care is appropriate in this matter.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>5</sup>

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.<sup>6</sup>

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<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>5</sup> K.S.A. 44-534a(a)(2).

<sup>6</sup> K.S.A. 2007 Supp. 44-551(2)(A).

It is clear neither K.S.A. 44-534a nor K.S.A. 2006 Supp. 44-510k limit an administrative law judge's ability to make determinations of ongoing disputed issues regarding pre- or post-award medical care.

Here, respondent argues that claimant's need for additional treatment is due to a cause not related to her injury suffered while working for respondent, thus bringing the dispute within the jurisdiction of the Board. The ALJ found claimant's need for medical treatment, including the insertion of the stimulator, arises from claimant's injuries on October 24, 2006, while claimant was working for respondent. This Board Member agrees with the conclusion reached by the ALJ. Claimant has been through a multitude of examinations and medical tests, with the end result being she still remains in pain resulting from that accident. The recommendations of Dr. Wilkinson are persuasive that a spinal cord stimulator may be of assistance in helping claimant's pain. Therefore, the decision to authorize Dr. Wilkinson and his recommended treatment is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

The Preliminary Decision of the ALJ is affirmed. Claimant has satisfied her burden that the recommended medical treatment offered by Dr. Wilkinson is intended to treat the effects of her work-related injury suffered on October 24, 2006, while working for respondent.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated March 19, 2008, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>7</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of July, 2008.

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HONORABLE GARY M. KORTE

c: Mark E. Kolich, Attorney for Claimant  
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge